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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 199

J. W. HALE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 413–418) is reported at 149 F. (2d) 401.

JURISDICTION

The judgment of the circuit court of appeals was entered May 11, 1945 (R. 419), and a petition for rehearing (R. 420–423) was denied June 7, 1945 (R. 424). The petition for a writ of certiorari was filed July 5, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII

of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the two counts of the indictment on which petitioner was convicted charge offenses under Section 3253 of the Internal Revenue Code with sufficient particularity.

2. Whether, in respect of the date of the offense charged in count 3, there was a material variance between the allegation of that count and the Government's proof.

STATUTE INVOLVED

The pertinent provisions of the Internal Revenue Code, as amended (26 U. S. C.), are:

> § 3250. *Tax.*—
>
> * * * * *
>
> (b) *Retail dealers in liquors*—(1) *In general.*—Except as provided in paragraph (3) of subsection (e), retail dealers in liquors shall pay a special tax of $27.50.
>
> § 3253. *Penalties and forfeitures for non-payment of special tax.*—Any person who shall carry on the business of a * * * retail liquor dealer, * * * and willfully fails to pay the special tax as required by law, shall, for every such offense, be fined not less than $100 nor more than $5,000 and be imprisoned for not less than thirty days nor more than two years. * * *

§ 3254. *Definitions.*—

* * * * *

(c) *Retail dealer in liquors.*—Except as otherwise provided, (1) every person who sells, or offers for sale, foreign or domestic distilled spirits, wines, or malt liquors in less quantities than five wine-gallons to the same person at the same time, shall be regarded as a retail dealer in liquors: * * *

§ 3271. *Payment of tax.*—(a) *Condition precedent to doing business.*—No person shall be engaged in or carry on any trade or business mentioned in this chapter until he has paid a special tax therefor in the manner provided in this chapter.

(b) *Due date.*—All special taxes shall become due on the 1st day of July in each year, or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for one year, and in the latter case it shall be reckoned proportionately, from the 1st day of the month in which the liability to a special tax commenced, to and including the 30th day of June following.

§ 3273. *Stamps.*—

* * * * *

(b) *Posting.*—Every person * * * who is thereby made liable to a special tax, shall place and keep conspicuously in his establishment or place of business all stamps denoting the payment of said special tax.

§ 3278. *Liability in case of business in more than one location.*—The payment of the special tax imposed shall not exempt from an additional special tax the person carrying on a trade or business in any other place than that stated in the collector's register; * * *.

STATEMENT

Petitioner was convicted in the United States District Court for the Western District of Louisiana (R. 370, 374) on counts 2 and 3 of an indictment in four counts (R. 1–4).[1] These counts charged that on June 2 and August 8, 1944, respectively, "in the Parish of Sabine, State of Louisiana, Western District of Louisiana," petitioner "did knowingly, wilfully, feloniously and unlawfully carry on the business of a retail liquor dealer and did wilfully fail to pay the special tax as required by law, in violation of Section 3253 of the Internal Revenue Code" (R. 2–3). Before trial, petitioner moved to quash the indictment on the ground, *inter alia,* that each count was uncertain and indefinite; the motion was overruled (R. 5–6). He was sentenced to imprisonment for

[1] The verdict of the jury (R. 370) is silent as to counts 1 and 4 and the record does not explain what disposition was made of those counts. They charged, respectively, that on August 17, 1944, petitioner possessed nine gallons of non-tax-paid distilled spirits, and concealed such spirits with intent to defraud the United States of the tax thereon (R. 2, 3–4).

eighteen months on count 2, and on count 3 imposition of sentence was suspended and he was placed on probation for five years to begin at the expiration of the imprisonment sentence (R. 373, 374). Upon appeal to the Circuit Court of Appeals for the Fifth Circuit, the conviction was affirmed (R. 419).

The evidence supporting counts 2 and 3 may be summarized as follows:

On June 2, 1944, W. E. Clark, a deputy sheriff of Sabine Parish, Louisiana, went to a Negro dance hall owned by petitioner, on a complaint that whiskey was being sold there (R. 65) in violation of a state law prohibiting the sale of liquor in that parish (R. 206). Inside the hall, Clark met a woman, Bessie Lee Miller, and asked her if he could get some liquor. She indicated that he should go to the front porch and see petitioner, which he did. Clark testified that at first petitioner told him that he did not sell liquor, but that finally petitioner took him inside and directed Mrs. Miller to sell him half of a fifth of Three Feathers whiskey. Clark further testified that Mrs. Miller thereupon handed him a half bottle of whiskey behind a screen about six feet away from petitioner, that she charged him $7.00 for it, and that he then arrested her. (R. 65–68, 97.) Mrs. Miller testified that she worked in the cafe at petitioner's hall (R. 146), and that she made the sale of liquor to Clark for

which he arrested her, as well as several other sales prior thereto (R. 147, 148, 149, 162).

In respect of count 3, P. M. Phillips, the sheriff of Sabine Parish, and two of his deputies, Clark and Glen Phares, testified that on July 8, 1944,[2] they arranged to have two soldiers go to petitioner's hall and offer to buy liquor (R. 72, 74, 173, 174). Accordingly, the soldiers went in and brought out a pint and a half of Schenley Reserve whiskey (R. 75, 175). Phillips and the deputies then accompanied the soldiers back to the hall where the soldiers identified Cephus Bell as the one who had sold them the liquor (R. 175, 199). In an upstairs room of the hall two or three pints of the same brand of whiskey were discovered by the officers (R. 76, 176, 200). Clark further testified that petitioner was present in the hall just before he arrested Bell (R. 89). Bell testified that while working for petitioner he had sold liquor to soldiers at the hall on the day he was arrested by the sheriff, and that on several previous occasions he had sold liquor there to other persons (R. 116, 117, 118, 119).

Petitioner had not paid the tax required by law of retail liquor dealers (R. 229, 230).

ARGUMENT

1. Petitioner contends (Pet. 4–5, 7, 9–16) that counts 2 and 3 are fatally defective for vagueness

[2] The date of the offense alleged in count 3 is August 8, 1944 (R. 3).

and failure to inform him of the offenses charged, and that the trial court therefore erred in overruling his motion to quash. He does not, and indeed could not, claim that these counts are bad for failure to allege any essential element of the crimes, but complains only that they do not allege "any additional facts descriptive of the offense charged, its time, place, or other circumstances, whereby petitioner could identify the alleged offenses and prepare his defense, or whereby, if he were convicted, the indictment and the judgment would protect him from future prosecutions for the same offenses" (Pet. 9–10; see also Pet. 12). This contention merits no further review by this Court.

Each of the counts alleges, substantially in the language of Section 3253 of the Internal Revenue Code, that on a specified date petitioner carried on the business of a retail liquor dealer in Sabine Parish, Louisiana, without having paid the special tax required by law. The essential elements of the offenses are thus set forth with sufficient definiteness and certainty to apprise petitioner of the nature of the accusations against him and to protect him against further prosecution for the same crimes. No more is required. *United States* v. *Lepowitch*, 318 U. S. 702, 704; *Hagner* v. *United States*, 285 U. S. 427, 431–433; *Lamar* v. *United States*, 241 U. S. 103, 116; *Ledbetter* v. *United*

States, 170 U. S. 606;[3] *Hopper* v. *United States,* 142 F. (2d) 181, 184 (C. C. A. 9); *United States* v. *Wernecke,* 138 F. (2d) 561 (C. C. A. 7), cer-

[3] In support of his argument, petitioner relies (Pet. 13) upon the concluding paragraph of the *Ledbetter* opinion in which this Court, after sustaining a conviction under an indictment couched in language almost identical with the language of the present indictment, except that it alleged only the month in which the offense occurred, remarked that it did not wish to be understood as approving the practice followed in that case or even as holding that the indictment might not have been open to special demurrer for insufficiency as to the allegations of time and place (170 U. S. at 614). This observation, especially in view of the other authorities cited above, hardly supports petitioner's argument, in which he makes no showing of prejudice, that his conviction should be overturned because of the failure of the indictment to describe the offenses in greater detail. Cf. 18 U. S. C. 556.

There is likewise no merit in petitioner's assertion (Pet. 4–5) that the decision below is in conflict with *Lynch* v. *United States,* 10 F. (2d) 947 (C. C. A. 8), as well as with *Jarl* v. *United States,* 19 F. (2d) 891, *Partson* v. *United States,* 20 F. (2d) 127, and *Turk* v. *United States,* 20 F. (2d) 129, all of which followed the *Lynch* case in the Eighth Circuit. The indictment in the *Lynch* case alleged that "on or about the 7th day of December, 1922, at Pawhuska, in Osage county, in the Western district of the state of Oklahoma, and within the jurisdiction of this court, H. L. Lynch, * * * did then and there knowingly, willfully, and feloniously have in his possession certain intoxicating liquor, to wit, one (1) pint of whisky, in and upon Indian country, to wit, Osage county, Oklahoma" (10 F. (2d) at 948). The decision that this indictment was bad for indefiniteness in the allegations as to time and place is no longer authoritative in the Eighth Circuit. See *Touhy* v. *United States,* 88 F. (2d) 930, 933 (C. C. A. 8).

tiorari denied, 321 U. S. 771; *Bersio* v. *United States,* 124 F. (2d) 310, 314 (C. C. A. 4), certiorari denied, 316 U. S. 665; *United States* v. *Goldsmith,* 108 F. (2d) 917, 920–921 (C. C. A. 2), certiorari denied, 309 U. S. 678; *Taran* v. *United States,* 88 F. (2d) 54, 56 (C. C. A. 8). While the details of the offenses might have been made more explicit, the failure to do so did not amount to a failure sufficiently to allege the elements of the offense defined in the statute. If petitioner wished further specifications as to the circumstances of the alleged offenses, his remedy was by motion for a bill of particulars. *Glasser* v. *United States,* 315 U. S. 60, 66.

Petitioner's argument (Pet. 12) that the allegation that the offenses were committed in Sabine Parish is not a sufficient identification of the situs of the crimes because of the requirement of Section 3278 of the Internal Revenue Code (*supra,* p. 4) that the special tax shall be paid for each place where a person carries on the business of a retail liquor dealer, is untenable. It is generally accepted that an indictment need state no more than that the offense was committed within the jurisdiction of the district court. *Ledbetter* v. *United States,* 170 U. S. 606, 613; *Malinow* v. *United States,* 42 F. (2d) 374, 375 (C. C. A. 4), certiorari denied, 282 U. S. 875. Furthermore, as petitioner apparently concedes (Pet. 11–12), the record in the present case is available to show

precisely the offenses of which petitioner stands convicted and thus to protect him against any feared future prosecution for the same crimes. *Capone* v. *United States,* 56 F. (2d) 927, 933 (C. C. A. 7), certiorari denied, 286 U. S. 553; *Malinow* v. *United States, supra;* see also *Dunbar* v. *United States,* 156 U. S. 185, 191.

2. For like reasons there is no merit in petitioner's contention (Pet. 10–12) that there was a material variance between the allegation of count 3 that the offense charged therein occurred on August 8, 1944, and the proof of an unlawful sale on July 8, 1944. Although it is true that where time is of the essence it must be alleged and established with precision, the general rule is that a variance between the date alleged and the date proved is not material, and proof of the commission of the offense on any date before the return of the indictment and within the period of the statute of limitations is sufficient. *Ledbetter* v. *United States, supra,* at 612; *Cornett* v. *United States,* 7 F. 2d 531, 532 (C. C. A. 8);[4] *Weeks* v. *Zerbst,* 85 F. (2d) 996, 997 (C. C. A. 10). It is clear, also, that the variance in no way affected the substantial rights of petitioner, in view of the proof as to his presence in the hall at the time of the sale on July 8 and the ensuing

[4] In this case the indictment alleged a sale of liquor on January 5, 1923, whereas the proof showed that it was made on January 5, 1924.

arrest of Bell (see p. 6, *supra*). Cf. *Berger* v. *United States*, 295 U. S. 78, 82.

CONCLUSION

The decision below is correct, the case does not present any question of general importance, and there is no real conflict with decisions of other circuit courts of appeal or of this Court. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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